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No. 91-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PENNZOIL COMPANY, *et al.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In the companion case to the captioned proceeding, *Phillips Petroleum Co., et al.*, Case No. 91-1, Petitioners filed a Reply Brief on September 6, 1991 ("the Phillips Reply") responding to the Brief for the United States in Opposition in both Case Nos. 91-1 and 91-34 ("Opp. Br."). Petitioners Pennzoil Company, *et al.* concur with and adopt the arguments of the Phillips Reply and do not here repeat them. Petitioners Pennzoil Company, *et al.* limit their discussion here to certain points unaddressed in the Phillips Reply.

1. The government's reliance on the line of cases relating to sovereign immunity is wholly misplaced. Whether or not Section 10 constitutes a condition on the government's waiver of sovereign immunity, it does not follow that Section 10 should be interpreted without regard to the presumption that statutes of limitation do not begin to run prior to the time a cause of action accrues. As in any case pertaining to the construction of a statute, the objective of the Court's inquiry must be to determine what "Congress intended". *Block v. North Dakota*, 461 U.S. 273, 287 (1983). Presumptive rules of statutory construction, as well as other canons of statutory interpretation, are aids to ascertain and to give effect to legislative intent.

Contrary to the government's argument, Opp. Br. at 10, traditional canons of construction are not to be swept aside in construing a statute of limitations that conditions the government's waiver of sovereign immunity. To the contrary, disregard of traditional canons of construction is clearly inappropriate where to do so would lead a court to interpret a statute of limitations "unduly restrictively." *Block*, 461 U.S. at 287.

In *Block*, the Court did *not* hold that otherwise applicable presumptions pertaining to the construction of statutes are inapplicable to provisions constituting a condition on a waiver of sovereign immunity. The Court simply rejected North Dakota's assertion that there was a rule that "States are presumed to be exempt from satisfying the conditions placed by Congress on its immunity waivers." 461 U.S. at 289. In the absence of such a presumption, the Court applied the plain language of the Quiet Title Act of 1972 to bar "any" civil action brought under the Act, including those brought by a State, unless the action was commenced within twelve years of the date upon which it accrued. 461 U.S. at 288. The Court further noted that nothing in the legislative history suggested that Congress intended to exempt the States from

the applicability of the 12-year limtiations period. 461 U.S. at 289.

In contrast, there is no dispute that the Court has recognized a presumption that, in the absence of clear language to the contrary, a limitations period should be interpreted as beginning to run only when the rights subject to it have accrued. *United States v. Wurts*, 303 U.S. 414, 418 (1938); *see also Woods v. Stone*, 333 U.S. 472, 476-77 (1948). As demonstrated in our petition for a writ of *certiorari*, the language of Section 10, its legislative history, and its authoritative interpretation by the Comptroller General establish that, in adopting the two-year limitations provision in Section 10, Congress did not intend to depart from the presumptive rule that such limitation periods begin to run only when rights have accrued.

2. The government is mistaken in arguing that the Federal Circuit did not rely on the rule of deference to the administrative construction of Section 10. Opp. Br. at 15. In the penultimate paragraph of its opinion, the Federal Circuit expressly relied on the rule that " 'the construction adopted by an agency charged with the duty to administer the statute . . . is usually given deference.' " App. 8a, citing *Beneficial Corp. & Subsidiaries v. United States*, 814 F.2d 1570, 1574 (Fed. Cir. 1987). The Federal Circuit went on to conclude that "[t]he IBLA's opinion was well-reasoned and did not violate the intent of Congress." App. 8a. Except for this erroneous contention, the government has not responded to our explanation of why the confused and inconsistent actions of the Interior Department deserve no deference in this case. Further, the government's argument that the Federal Circuit decision rests solely on the plain meaning of the statute is particularly disingenuous given that the government's current interpretation of Section 10—that the two-year period runs from the date of "payment"—is different from the Federal Circuit's interpretation of the

same language—that the two-year period runs from the date of "excess payment."

3. The government characterizes Petitioners' interpretation of Section 10 as "unnatural." Opp. Br. at 8. This stands reason on its head. Here both the Claims Court and the Federal Circuit concurred with the Producers that "the phrase 'making of the payment' refers to the making of an *excess payment.*" App. 6a. (Emphasis added). Yet the Federal Circuit went on to conclude that the two-year period in Section 10 began to run against Petitioners prior to issuance of the decision in *Interstate Natural Gas Ass'n of America v. FERC*, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984) ("*INGAA*"). As the government itself stipulated, prior to *INGAA*, the Petitioners paid royalties to the MMS based on the then-effective ceiling prices established under Order No. 93, F.E.R.C. Stats. & Regs. [Regs. Preambles, 1977-1981] (CCH) ¶ 30,172 (1980), 45 Fed. Reg. 49,077 (July 23, 1980) ("FERC Order No. 93"), and such royalty payments were "in the amounts then lawfully required" by the MMS. App. 95a. The government's admission of the fact that Petitioners' royalty payments made prior to *INGAA* were not in excess of the amount then lawfully required cannot be squared with its construction of Section 10, adopted by the Federal Circuit, that the two-year period began to run prior to *INGAA*. Under this construction, the limitations period began to run against Petitioners at a time when their royalty payments were in the lawfully required amount and therefore before there was any excess for Petitioners to recover and before a right to a refund came into being. But it is this interpretation that is "unnatural" in that it is flatly inconsistent with the Federal Circuit's own conclusion that the two-year period began to run upon the making of an "excess payment." Worse, it scarcely accords with fairness or reason to hold that limitations, intended to bar those who have slept on their rights, run against those who during the period of its running lack any rights.

4. The government asserts that Petitioners should have availed themselves of "procedures established by MMS" to protect their rights. Opp. Br. at 7. In so arguing, the government appears to suggest that, prior to *INGAA*, the MMS had in place established procedures for preserving contingent refund claims. The record refutes the government's argument.

As abundantly demonstrated by the letter announcement of the MMS after the *INGAA* decision was handed down, it was MMS' policy that it would not accept refund requests until this Court acted on petitions for a writ of *certiorari* in *INGAA*. App. 56a; *see also* 52a-54a. MMS did not develop any "procedures" until after petitions for a writ of *certiorari* were denied. App. 57a-67a. Indeed, the IBLA held that MMS had failed to promulgate any binding procedures, and that the only substantive requirement extant was Section 10 itself. App. 46a-47a. As the IBLA concluded:

> Absent controlling regulations, the only standard which may be applied is that of the language of section 1339 [OCSLA Section 10] itself.

App. 48a.[1] Indeed, the IBLA observed that it was the absence of any regulatory procedures promulgated by the MMS that gave rise to the dispute at issue in the case in the first place. App. 49a.

Accordingly, the government cannot in candor claim that it was Petitioners' failure to follow MMS procedures

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[1] The government's attempt (Opp. Br. at 11) to characterize the 1981 opinion of the Solicitor of the Interior as "approving" substantive procedures upon which the Producers could rely—and of which they should now be held to have had knowledge—is flatly inconsistent with the IBLA's subsequent decision. App. 47a. To that extent, the argument constitutes a *post hoc* rationalization of counsel and must be rejected.

that is the cause of Petitioners' grievance here. Prior to *INGAA* MMS had no such procedures, and the absence of such procedures led even the MMS official in charge of the MMS' royalty program, the Associate Director of Royalty Management for MMS, to believe that no refund requests were due until final resolution of *INGAA*. (App. 56a).

5. The government attempts to distinguish the Comptroller General's authoritative interpretation of Section 10 on the basis of the gloss placed on that interpretation by the Solicitor of the Department of the Interior in his subsequent opinion. Opp. Br. at 13-14 n.8. There is no basis for the Solicitor's assertion of authority to repudiate the controlling interpretation of Section 10 by the Comptroller General. *See United States v. Bergh*, 352 U.S. 40, 46-47 (1956); *Pettit v. United States*, 488 F.2d 1026, 1031 (Ct. Cl. 1973). Moreover, the Solicitor's effort to harmonize his opinion with the Comptroller General's opinion is based on *post hoc* rationalization. Contrary to the Solicitor's statements, the Comptroller General nowhere relied on the filing of a "protest" (there is no indication that a protest was ever filed in the matter before him) or on the pendency of the unitization agreement before another branch of the Department. App. 72a-78a. The Comptroller General's opinion was explicitly based on a construction of Section 10. Consistent with an earlier opinion of an Assistant Solicitor of the Department of the Interior, App. 68a-71a, the Comptroller General concluded that the two-year period did not begin to run on royalty payments that were in the amounts lawfully required when made until the effective issuance of a retroactively applicable decision that rendered the payments excessive. As the Comptroller General reasoned, a claim for refund is timely if filed "within two years of the date upon which it could first be determined that excess royalty payments had, in fact, been made." App. 74a.

CONCLUSION

The decision of the Federal Circuit in this matter affecting substantial royalty revenues collected under Outer Continental Shelf leases is demonstrably wrong, contrary to this Court's prior decisions, at variance with well-established rules of statutory construction, and grossly unfair to the government's lessees. The Court should grant *certiorari* and correct it.

Respectfully submitted,

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